FILED

(1) 97.131 MAY 2 2 1997

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

A-1 APPLIANCE; ALBO APPLIANCE; **APPLIANCE WORLD, INC.;** BLONDER'S DISCOUNT APPLIANCE CENTER, INC.; **CT'S VIDEO AND APPLIANCES;** INNERSPACE, INC.; **JOHNNIES APPLIANCE;** NATASTI'S INC.; **POMOLIO APPLIANCE;** WOODBURY APPLIANCE; **YERKES APPLIANCE,**
Petitioners

v.

DEUTSCHE FINANCIAL SERVICES CORP.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROBERT L. WHITE
172 Middletown Blvd., Suite 203
Langhorne, PA 19047
215.752.3535
Petitioners' Counsel of Record

31 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the U. S. Court of Appeals, Third Circuit, misstated the law regarding Federal Rule of Civil Procedure 50(a)(2) by holding that "apparent awareness" by the trial court of a party's position is sufficient compliance with the Rule, when there is nothing whatever on the record supporting the party's position?

2. Whether the U. S. Court of Appeals, Third Circuit, abused its discretion and violated defendants' due process rights and may have violated defendants' seventh amendment rights when it reversed the lower court and entered judgment for plaintiff and failed to order a new trial?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The list of parties to the proceedings in the court below includes: Deutsche Financial Services Corp., Blonder's Discount Appliance Center, Inc.; ALBO Appliances; Pomolio Appliance Sales & Service; Johnnies Appliances; Yerkes Appliance & Service; A-1 Appliance Sales & Service; Woodbury Appliance; Nastasi's, Inc.; CT's Video and Appliances, Inc.; Appliance World, Inc.; and Innerspace, Inc.

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CASES

Bonjorno v. Kaiser Aluminum & Chemical Corp., 752 F.2d 802 (3rd.Cir. 1984), *cert. denied*, 477 U.S. 908; 91 L.Ed.2d 572 (1986)

Chemical Leaman Tank Lines v. Aetna Cas. & Sur. Co., 89 F.3d 976 (3rd.Cir. 1996).

In re Lower Lake Erie Iron Ore Antitrust Lit., 998 F.2d 1144 (3rd.Cir. 1993), *cert. denied,* 114 S.Ct. 921; 127 L.Ed.2d 215

Neely v. EBY Construction Co., 386 US 317; 87 S.Ct. 1072; 18 L.Ed. 75 (1967).

Simmons v. City of Philadelphia, 947 F.2d 1042 (3rd.Cir. 1991), *cert. denied,* 503 U.S. 985; 112 S.Ct. 1671; 118 L.Ed.2d 391 (1992)

RULES

Federal Rule of Civil Procedure 50

OPINIONS BELOW

The January 27, 1997 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed is included with this Petition. The February 2, 1996 Memorandum of the United States District Court for the Eastern District of Pennsylvania, and related order is also included with this Petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on January 27, 1997. A *Petition for Rehearing* was timely filed and the court denied it by Order dated March 10, 1997. A *Petition for Rehearing* was timely filed and the court denied it by Order dated April 1, 1997. The jurisdiction of this Court is invoked pursuant to 28 USC § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

Federal Rule of Civil Procedure 50:

(a) Judgment as a Matter of Law.

(1) If during a trial by jury ***a party has been fully heard on an issue*** and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial.

If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The

movant may ***renew*** its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment - and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:
  (A) allow the judgment to stand,
  (B) order a new trial, or
  (C) direct entry of judgment as a matter of law; or
(2) if no verdict was returned:
  (A) order a new trial, or
  (B) direct entry of judgment as a matter of law.

STATEMENT OF THE CASE

The basis for federal jurisdiction in the court of first instance was diversity of citizenship, 28 USC § 1332.

During the trial Plaintiff made a motion for directed verdict (Rule 50a motion)[1] which did not specifically raise the issue that the evidence at trial was insufficient to support a finding of unclean hands against plaintiff.

Although plaintiff made numerous objections, ***never during the course of the trial did plaintiff raise the issue that there was insufficient evidence to support a finding of unclean hands.*** After defendants rested, plaintiff's counsel stated that he wished to move for directed verdict. The trial judge responded unless counsel had something new to add he would deny the motion. Plaintiff's counsel responded: "No."

The appellate court below concluded from ***these facts*** that plaintiff intended to raise the issue of insufficiency of evidence regarding unclean hands. It further concluded that the trial judge was "apparently aware" of plaintiff's intention to do so. However, the appellate court below failed to explain how the record indicated that non-moving parties were aware of plaintiff's ***supposed*** intention.

The case was submitted to the jury on special interrogatories and a verdict was rendered by the jury in favor of defendants, the jury having concluded that defendants proved their defense of unclean

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1. *See* Federal Rule of Civil Procedure 50

hands. Plaintiff filed a post-trial motion for judgment n.o.v. (Rule 50b motion) arguing that the evidence at trial was insufficient to support a finding of unclean hands. The trial court denied plaintiff's post-trial motion because plaintiff had not raised this issue in its Rule 50(a) motion,[2] although as the trial court in its opinion points out that plaintiff's counsel had numerous opportunities to do so.

Plaintiff appealed the trial court's denial of its JNOV motion. The Third Circuit Court of Appeals held that if a party announces its intention to make a motion pursuant to Federal Rule of Civil Procedure 50(a)(2), and the trial judge, apparently aware of the party's position, indicates that nothing further is required, then the purpose of the Rule was sufficiently served and the party's claim on appeal can be evaluated by an appellate court. As a result of this holding the appellate court considered the issue of insufficiency of evidence regarding unclean hands and reversed the jury's verdict and entered judgment in favor of plaintiff. No new trial was ordered.

REASONS FOR GRANTING WRIT

SUMMARY.

1.) The ruling in the present case directly conflicts with other decisions, more specifically, but not limited to, the following cases: Bonjorno v. Kaiser Aluminum & Chemical Corp., 752 F.2d 802 (3rd.Cir. 1984), *cert. denied*, 477 U.S. 908; 91 L.Ed.2d 572 (1986); Simmons v. City of Philadelphia, 947 F.2d 1042 (3rd.Cir. 1991), *cert. denied,* 503 U.S. 985; 112 S.Ct. 1671; 118 L.Ed.2d 391 (1992); In re Lower Lake Erie Iron Ore Antitrust Lit., 998 F.2d 1144 (3rd.Cir. 1993), *cert. denied,* 114 S.Ct. 921; 127 L.Ed.2d 215; and Chemical Leaman Tank Lines v. Aetna Cas. & Sur. Co., 89 F.3d 976 (3rd.Cir. 1996).

2.) The ruling directly conflicts with Neely v. EBY Construc-

---

2. The trial court in its denial order makes it clear that it was not aware of plaintiff's intention to raise an issue about unclean hands. Accordingly, there is insufficient evidence of record for the Third Circuit Court of Appeals to have ruled the way that the trial court was "apparently aware" of plaintiff's position. However, the asserted error in this matter is a misstatement of the law and not erroneous factual findings or the misapplication of a properly stated rule of law.

tion Co., 386 US 317; 87 S.Ct. 1072; 18 L.Ed. 75 (1967).

ARGUMENTS.

I. The trial judge in his Opinion makes it clear that he was not aware of plaintiff's position and, therefore, denied plaintiff's post-trial motion. Even if the trial judge was aware of plaintiff's position, the rule was misstated by the Third Circuit Court of Appeals because it is not critical whether the trial judge was aware of plaintiff's position or not. ***What matters is whether the moving party's position is stated on the record.***[3] The purpose of the rule is to afford the non-moving party an opportunity to reopen its case and present additional evidence. Bonjorno, 752 F.2d @ 814. The non-moving party would be unable to discern whether to open the record to present additional testimony without a statement by the moving party of his position on the record. That is why the rule requires that the moving party state with specificity the judgment sought and the law and facts on which the moving party is entitled to judgment. FRCP 50(a)(2). The Bonjorno court put it best:

> The requirement that the specific issue be raised first in the motion for a directed verdict, before the issue is submitted to the jury, affords the non-moving party an opportunity to reopen its case and present additional evidence. Lowenstein v. Pepsi-Cola Bottling Co., 536 F.2d 9, 11(3d.Cir.), *cert. denied,* 429 US 966, 97 S.Ct. 396, 50 L.Ed.2d 334 (1976). Further, when a trial court decides an issue after it was properly submitted to the jury, it may deprive the non-moving party of his seventh amendment rights. *Id.*

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3. Obviously a moving party must state its position on the record if the trial judge is going to be aware of it. However, the reverse is not true: if the trial judge is only "apparently aware" of the moving party's position, then the moving party must have stated its position on the record. ***In the instant matter the moving party did not state its position on the record.***

Bonjorno, 752 F.2d @ 814.

A review of the entire record does not disclose any reference to the plaintiff's intention to raise the insufficiency of evidence to support the defense of unclean hands. The trial court could find no such reference. The plaintiff admits that he never raised the issue at trial.

The Third Circuit's holding that there is sufficient compliance with FRCP 50 when the trial judge is "apparently aware" of a party's position is a misstatement of the law. "Apparent awareness" by the trial judge is not the standard by which Rule 50 motions have been governed. To allow such a standard would open the door to all kinds of misapplications of the Rule. For example the appellate courts would in each instance be able to guess what was in the mind of the trial judge without making any reference to the record whatever. To allow the "apparent awareness" standard to be the standard by which Rule 50 motions may be governed would have the effect of defeating the very purpose and clear language of the Rule. It would render the Rule meaningless.

II. The U. S. Court of Appeals for the Third Circuit entered a judgment reversing the jury's verdict and entered judgment for the plaintiff.

In Neely v. EBY Construction Co., *supra*, this Court stated:

> Rule 50(d) is applicable to cases such as this one where the trial court has denied a motion for judgment n.o.v. Rule 50(d) expressly preserves to the party who prevailed in the district court the right to urge that the court of appeals grant a new trial should the jury's verdict be set aside on appeal.... ...there is nothing in Rule 50(d) indicating that the court of appeals may not direct entry of judgment n.o.v. in appropriate cases. (emphasis supplied)

The Court in Neely indicated that "appropriate cases"

> are situations where the defendant's

> grounds for setting aside the jury's verdict raise questions of subject matter jurisdiction or disposition issues of law which, if resolved in defendant's favor, must necessarily terminate the litigation...In such situations, and others like them, there can be no reason whatsoever to prevent the court of appeals from ordering dismissal of the action on the entry of judgment for the defendant.
>
> **On the other hand, where the court of appeals sets aside the jury's verdict because the evidence was insufficient to send the case to the jury, it is not so clear that the litigation should be terminated.** (emphasis supplied) Neely, L.Ed. 2d @ 83.

This court went on to point out rulings by the trial court causing the insufficiency of evidence, i.e., erroneous exclusion of evidence are important factors to consider in granting a new trial rather than reversal.

In this case, the fact that the plaintiff never stated on the record that there was insufficient evidence on the defense of unclean hands, left the defendants in a position of not knowing that insufficient evidence on unclean hands was even a consideration for the Court.

This Court points out in Neely, 18 L.Ed 2d. @84 that "If appellee presents no new trial issue in his brief or in a petition for rehearing, the court of appeals may, in any event, order a new trial on its own motion, or refer the question to the district court based on factors encountered in its own review of the case."

The Court of Appeals below ignored its duty in this respect because its opinion never expressly dealt with the new trial question.

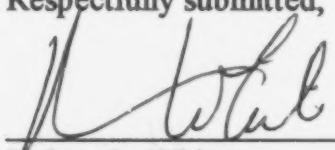
As this Court has pointed out, insufficiency of evidence is not an "appropriate case" for granting a reversal of the jury's verdict. The

court of appeals erred by not granting a new trial.

CONCLUSION

For the foregoing reasons, the petitioner respectfully prays that its petition for a writ of certiorari be granted.

Respectfully submitted,



Robert L. White
172 Middletown Boulevard,
Ste. 203
Langhorne, PA 19047
215.752.3535
Petitioners' Counsel of Record

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-1150

DEUTSCHE FINANCIAL SERVICES CORPORATION
(f/k/a ITT COMMERCIAL FINANCE CORPORATION)
Appellant
v.
MARTA GROUP, INC.
Appellees

SUR PETITION FOR PANEL REHEARING

BEFORE: STAPLETON, ROTH and WEIS, Circuit Judges

The joint petition for panel rehearing filed by appellees Albo Appliance, Pomolio Appliance, Johnnies Appliance, Yerkes Appliance, Al Appliance, Woodbury Appliance, Nastasi's Inc., CT's Video and Appliances, Appliance World, Inc., and Innerspace Inc., in the above-entitled case having been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision having asked for panel rehearing, the petition for panel rehearing is denied.

By the Court,
/s/
Walter K. Stapleton, Circuit Judge

Dated: April 1, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 96-1150

DEUTSCHE FINANCIAL SERVICES CORP.
Appellant
v.
MARTA GROUP, INC., ET AL.
Blonder's Discount Appliance Center, Inc.,
Appellee

SUR PETITION FOR REHEARING

BEFORE: BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MCKEE and WEIS,* Circuit Judges

The petition for rehearing filed by appellee Blonder's Discount Appliance Center, Inc., in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
/s/
Walter K. Stapleton, Circuit Judge

Dated: March 10, 1997

* Hon. Joseph F. Weis, Jr., Senior Circuit Judge, was a member of the original panel. His vote is limited to panel rehearing only.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-1150

DEUTSCHE FINANCIAL SERVICES CORP.,
Appellant

vs.

MARTA GROUP, INC.; THE PATANE GROUP, INC. t/a APPLIANCELAND, ETC. d/b/a APPLIANCE LAND ETC.; CB JOE TV & APPLIANCE CO.; FRANK DEFRANK d/b/a DEFRANK'S APPLIANCES; DELAWARE VALLEY APPLIANCES INCORPORATED; DONAT, INC. t/a DONATUCCI KITCHENS & APPLIANCES; LESLIE S. GEISSEL d/b/a JENKINTOWN ELECTRIC CO.; LAKES APPLIANCE & TV, INC.; ROB STEVENS, INC. f/k/a ROBERT STEVEN, INC.; EDWARD P. PETRILLO d/b/a PETRILLO'S APPLIANCES; STEVE & ART KRUPNICK, INCORPORATED d/b/a SCHNEIDER'S NORTHEAST APPLIANCES; C.K. SEIDMAN, INC.; SINGER'S APPLIANCE INCORPQRATED; A-l APPLIANCE SALES & SERVICES; A&A APPLIANCE; ABC SALES & SERVICE, INC.; ALBO; ALCO ELECTRONICS, INC.; AMERICAN APPLIANCE AND REFRIGERATION CO., INC.; ANGELO NERI, INC.; APPL. ELECTRONIC VILLAGE, INC.; APPLIANCE LAND, ETC.; APPLIANCE PLUS; APPLIANCE WORLD, INC.; ARRAY APPLIANCE CTR., INC.; ASSOCIATED APPLIANCES, INC.; BLONDER'S DISCOUNT APPL. CENTER, INC.; BOB LANG, INC.; BUTCH'S DISCOUNT APPLLANCE; C. K. SEIDMAN; CB JOE TV & APPL., CO.; CENTRAL DISCOUNT CTR., INC.; CHERTOK'S; COLIN F. TAIT, INC.; COLLEGE TV, INC.; CONLAND'S SERVICE CO.; CT'S VIDEO & APPLIANCES, INC.; CUMMINS APPLIANCE COMPANY; DAWSON FACTORY DIRECT; DEFRANK'S APPLIANCE & TV; DEAL; DEAVERS APPL. CO., INC.; DELAWARE VALLEY APPL.,

INC.; DOLAN'S, INC.; DOMINIC'S APPLIANCES, INC.; DONATUCCI KITCHENS & APPL.; EASTERN TV & APPL., INC.; ELKAY ELECTRICAL APPLIANCE, INC.; EMPIRE BLDG. & HOME; FRANK FENDEL'S APPLIANCES; GLBERT'S VIDEO AND APPL., INC.; H&H DISCOUNT APPLIANCE CO., INC.; INNERSPACE, INC.; INTERNATIONAL TRADING CO., INC.; JENKINTOWN ELECTRIC CO.; JERRY PLAVIN, INC.; JOHNNIES APPLIANCES; KIEFER'S APPLIANCES, INC.; LAKES APPLIANCES & T.V., INC.; LAPLATA TV & APPLIANCE, INC.; LIEB'S APPLIANCES; LONG LANE APPLIANCES; M & L APPLIANCE; M S SENSENIG & SON, INC.; MAIDEN CREEK TV & APPL., INC.; MAIN STREET A/V; MICHAEL'S APPLIANCE AND FURNITURE, INC.; MILLNER LUMBER CO.; MRS. G'S APPLIANCE; NASTATI'S; NICHOLAS HARDWARE, INC.; NICKS DISCOUNT Ty & APPL., INC.; OSBORNE TV & APPL., INC; OTTO FAULHABER, INC.; PETRILLO'S APPLIANCE; POMOLIO APPLIANCE SALES & SERV.; POSITIVE, INC.; REED'S REFRIGERATION; ROBERT STEVENS; ROUTZAHN & SONS, INC.; ROXY ELECTRIC, INC.; SAMUEL R. GOODMAN, INC.; SCHNEIDER'S ART'S APPL. AND KITCHEN DESIGN CENTER; SEIDMAN, C.K., INC.; SHORE APPLIANCES, INC.; SINGER'S APPLIANCE CO., INC.; SPENCER T.V. & APPL. SALES; SUJON ENTERPRISES, INC. d/b/a QUEEN TV AND APPL.; SUPERK CORPORATION t/a ABC DISCOUNT; TED'S APPLIANCE OUTLET, INC.; TONY FERRARA, INC.; UNITED PROPANE, INC.; VIDEO & APPL. UNLMTD., INC.; WOODBURY APPLIANCE; YERKES APPLIANCE & PARTS

ABC SALES AND SERVICE, INC.; APPL. ELECTRONIC VLLAGE, INC.; APPLIANCE LAND, ETC.; PETRILLO'S APPLIANCE
ThirdParty Plaintiffs

v.

ABC DISCOUNT; AIRS APPLIANCE, INC.; APPLIANCE CONNECTION; APPLIANCE DIFFERENCE; B.B. MORRIS & SON;

CARL LEHMAN & SON
Third Party Defendants

ABC SALES AND SERVICE, INC.; APPL. ELECTRONIC VILLAGE, INC.; APPLIANCE LAND, ETC.; ARRAY APPLIANCES CTR., INC.; BOB LANG, INC.; C. K. SEIDMAN; CB JOE TV & APPL., CO.; CENTRAL DISCOUNT CTR., INC.; CUMMINS APPLIANCE COMPANY; DEFRANK'S APPLIANCE & TV; DEAVERS APPL. CO., INC.; DELAWARE VALLEY APPL., INC.; DOLAN'S INC.; DOMINIC'S APPLIANCES, INC.; DONATUCCI KITCHENS & APPL.; JENKINTOWN ELECTRIC CO.; KIEFER'S APPLIANCES, INC.; LAKES APPLIANCES & T.V., INC.; MAIDEN CREEK TV & APPL., INC.; MAIN STREET A/V; MICHAEL'S APPLIANCE AND FURNITURE, INC.; NICHOLAS HARDWARE, INC.; ROBERT STEVENS; ROUTZAHN & SONS, INC.; ROXY ELECTRIC, INC.; SAMUEL R. GOODMAN, INC.; SCHNEIDER'S ART'S APPL. AND KITCHEN DESIGN CENTER; SIGNER'S APPLIANCE CO., INC.; TED'S APPLIANCE OUTLET, INC.
Third Party Plaintiffs

v.

ABC DISCOUNT; AIRS APPLIANCE, INC.; APPLIANCE CONNECTION; APPLIANCE DIFFERENCE; B.B. MORRIS & SON; CARL LEHMAN & SON; HOME APPLIANCE CENTER; McGUIRE APPLIANCE, INC.; QUEEN DISCOUNT CENTER, SANATOGA CORP.; UNITED BUYING GROUP
Third Party Defendants

DEUTSCHE FINANCIAL SERVICES CORP., formerly known as ITT Commercial Finance Corp., Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civ. No. 94-cv-04592)

Argued December 20, 1996

Before: STAPLETON, ROTH, and WEIS, Circuit Judges.

Filed: January 27, 1997

Charles M. Tatelbaum, Esquire (ARGUED)
James W. Humann
Johnson, Blakely, Pope, Bokor, Ruppel & Burns, P.A.
P.O. Box 1368
Clearwater. FL 34617-1368

Roberta D. Liebenberg, Esquire
Mager, Liebenberg & White
2 Penn Center, 10th Floor
Philadelphia, PA 19102

Attornies for appellant Deutsche Financial Services Co Finance Corp., formerly known as ITT Commercial Finance Corp.

Christopher E. Kaltenbach, Esquire (ARGUED)
Matteo & Belko
502 Pleasant Valley Avenue
Moorestown, NJ 08057

Attorney for Albo Appliances, Pomilio Appliances, Johnnie's Appliances, Yerkes Appliances and Parts, A-1 Appliance, Woodbury Appliance and Nastasi's Inc.

Robert L. White, Esquire (ARGUED)
172 Middletown Boulevard
Langhorne, PA 19047

Attorney for Blonder's Discount Appliance Center Inc.

Ronald F. Brien, Esquire
808 Westfield Avenue
Spring City, PA 19475

Attorney for Appliance World. Inc.

Michael R. Bradley, Esquire
Brooks, Bradley & Kenney
Second & Plum Streets
Media, PA 19063

Attorney for Innerspace. Inc.

OPINION OF THE COURT

WEIS, Circuit Judge

In this diversity action, plaintiff sought to recover secured property taken by defendants. The jury returned answers to interrogatories favorable to plaintiff on three of four counts, but also found that plaintiff had unclean hands. The district court entered judgment in favor of defendants. Because there was insufficient evidence of unclean hands, we will reverse.

Plaintiff ITT (presently known as Deutsche Financial Services Corp.),[1] provided financing to Marta Group, Inc., a member-only cooperative buying group. Through Marta, defendants were able to obtain mass purchase discounts on wholesale appliances. To secure its financing, ITT had a first perfected security interest in all of Marta's assets.

In late 1993, Marta began experiencing serious cash flow difficulties. On July 27, 1994, ITT received an anonymous fax advising the company that there was a problem at the Marta warehouse. When ITT representatives arrived, they found defendants loading at least sixty-five trucks with inventory from the warehouse. The raid on the warehouse had been initiated by Marta's executive director, who had advised defendants that the warehouse was going to close down and that they should retrieve the value of their initial deposit in Marta by taking the inventory.

In the present action, ITT asserted four claims. First, ITT was

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1. Plaintiff was referred to as ITT throughout the proceedings in the district court. For the sake of clarity, we will continue that practice here.

entitled to recover on accounts receivable due by defendants to Marta. Second, ITT's security interest granted it a right to recover the value of the inventory taken because defendants acted outside the course of business. Third. Marta's transfer of cash and credit to defendants as membership benefits violated Pennsylvania's Uniform Fraudulent Conveyance Act and the Uniform Fraudulent Transfer Act. Fourth, the defendants' use of offsetting credits to reduce their debts to Marta was a fraudulent conveyance or transfer under state law.

The trial was bifurcated and the case on liability was submitted to the jury on interrogatories. The jury found against ITT on the first count and decided that ITT was barred from recovering on the other counts because it was guilty of unclean hands. ITT does not appeal the jury's verdict as to the first count.

ITT subsequently moved for judgment as a matter of law, arguing that the equitable defense of unclean hands was unavailable in actions at law. ITT also asserted that the trial court's jury instructions were erroneous and that there was insufficient evidence to support a finding of unclean hands. The district court denied ITT's motion, finding that it had failed to object to the jury instructions at trial. As to the sufficiency of the evidence issue, the court found that ITT had waived that issue by failing to move for judgment as a matter of law on that ground at the conclusion of all the evidence.

A.

We first address ITT's challenge to the unclean hands instruction. Federal Rule of Civil Procedure 51 provides: "No party may assign as error the giving [of] ... an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Although we recognize an exception to this rule for "plain errors," see Beardshall v. Minuteman Press Int'l Inc., 664 F.2d 23, 27 (3d Cir. 1981), we cannot conclude that the district court committed one here.

B.

The motion for judgment as a matter of law on the sufficiency

of the evidence, on the sufficiency of the evidence, on the other hand, presents a different situation. The district court denied this motion because ITT had failed to move for a judgment as a matter of law at trial. However, we believe that ITT adequately complied with the Rule's requirements.

After defendants rested, ITT's counsel stated that he wished to move for a directed verdict. The trial judge responded that unless counsel had something new to add, the motion was noted, but denied. ITT's counsel moved again for directed verdict after rebuttal, but the court declined to hear an elaboration of the grounds.

Federal Rule of Civil Procedure 50(a)(2) directs parties to "specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment." Here, When ITT's counsel announced his intention to make the appropriate motion, the able and experienced trial judge, apparently aware of ITT's position, indicated that nothing further was required. Under these circumstances, we conclude that the purpose of the Rule was served and we are not barred from evaluating ITT's claim on appeal. See Miller v. American President Lines, Ltd., 989 F.2d 1450, 1465 (6th Cir. 1993). Rather than remand for tile district court to evaluate the sufficiency of the evidence, in the interest of judicial economy, we will consider the merits.

Under Pennsylvania law, the affirmative defense of unclean hands arises when the "wrongdoing directly affects tile relationship subsisting between the parties and is directly connected with the matter in controversy." Estate of Pedrick, 482 A.2d 215, 223 (Pa.1984). The defense does not bar recovery merely because the other party has not been blameless. Id. at 222-23. It is applicable when "the party seeking affirmative relief is guilty of fraud, unconscionable conduct or bad faith directly related to the matter at issue which injures the other party and affects the balance of equities between the litigants." Equibank v. Adle, Inc., 595 A.2d 1284, 1287 (Pa. Super. Ct. 1991). In the present case, defendants rely on testimony produced during cross-examination of ITT's witnesses. That evidence, however, fails to establish a case of unclean hands.

Courtland Morris, Marta's president, testified that his organization did not notify ITT of its cash flow problems until a week before the run on the warehouse because of fears that ITT would close down Marta. Defendants assert that ITT engaged in collusion

because at various times in 1993 and 1994, Marta's debt was under collateralized by $1 million and Marta was past due in its payments. Yet, ITT's senior vice president, Robert Incollingo, testified that despite these acknowledged deficiencies, ITT continued to work with Marta during this period because the company believed that the security interest in Marta's total assets was sufficient protection.

Defendants also argue that ITT had a cozy relationship with Marta's executive director, and was in a better position to fully comprehend Mart a's financial situation than they. We fail to see how evidence of two or three business lunches with the executive director in a twelve-year period constitutes a basis for finding unclean hands. In addition, defendants, as members of Marta, had the opportunity to inform themselves about Marta's financial situation by attending membership or executive committee meetings. ITT, on the other hand, relied on the audited financial statements, which were later found to have been improperly prepared. In sum, although there appears to have been some questionable conduct on the part of Marta towards its members, ITT's willingness to "work things out" with Marta does not mean that ITT had unclean hands in its dealings with defendants.

Consequently, because there was insufficient evidence to support a finding of unclean hands, judgment should have been entered in favor of ITT and the case should have proceeded to damages.

C.

Finally, we also note that ITT asserts that the defendants' made improper remarks during closing argument. Specifically, ITT points to statements attributed to non-testifying parties, comments about the financial disparity between ITT and defendants, appeals to the jury's sympathy and opinions given about the evidence.

Although we agree that these comments were inappropriate,

ITT failed to timely object to them at trial, thus it has waived this issue on appeal. Dunn v. HOVIC, 1 F.3d 1371, 1377 (3d Cir. 1993) (en banc).

D.

Accordingly, the judgment of the district court will be reversed and the case will be remanded with directions that judgment be entered in favor of ITT on counts two, three and four, and that the matter proceed to an assessment of damages.

TO THE CLERK:
Please file the foregoing Opinion.

/s/
Joseph F. Weis, Jr.,
United States Circuit Judge

APPEAL FROM THE UNITED STATED DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civ. No. 94-cv-04592)

Present: Stapleton, Roth and Weis, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on December 20 1996.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered February 5, 1996, be, and the same is hereby reversed and the cause is remanded to the District Court with instructions to enter judgment in favor or ITT on counts two, three and four and that the matter proceed to an assessment of damages. Costs taxed against appellees. All of the above in accordance with the opinion of this Court.

ATTEST:
/s/
P. Douglas Sisk, Clerk
Dated: January 27, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
Civil Action; No. 94-4592

DEUTSCHE FINANCIAL SERVICES CORP.
Plaintiff,
v.
MARTA GROUP , INC ., et al.
Defendants,

Newcomer, J.
February 2, 1996

MEMORANDUM

Presently before the Court is plaintiff's Motion for Judgment Notwithstanding the Verdict, defendants' responses thereto, and plaintiff's reply thereto. For the reasons that follow, plaintiff's Motion will be denied.

I. Background

The trial of the instant action commenced on November 27, 1995 and resulted in the entry of judgment for defendants on all counts on December 4, 1995. Plaintiff proceeded against defendants at trial on four counts. First, plaintiff claimed that it was entitled to recover on accounts receivable due by defendants to Marta Group, Inc. ("Marta"), a Pennsylvania non-profit corporation operating as a members only buying group. Second, plaintiff claimed Marta's warehouse to defendants on July 27, 1994 were out of the ordinary course of business and thus that plaintiff's lien on Marta's inventory remained in place entitling plaintiff to recover the value of the inventory taken. Third, plaintiff claimed that the transfers of cash and credits, in the nature of membership benefits, by Marta to defendants were fraudulent conveyances or transfers under the Pennsylvania Uniform Fraudulent Conveyance Act and the Pennsylvania Uniform Fraudulent Transfer Act. Finally, plaintiff claimed that defendants' use of offsetting credits to reduce their debts to Marta was a fraudulent conveyance or transfer under the Pennsylvania Uniform Fraudulent

Conveyance Act and the Pennsylvania Uniform Fraudulent Transfer Act.

The case was submitted to the jury on special interrogatories. On the first count, the jury found that plaintiff did not prove by a preponderance of the evidence that defendants owed accounts receivable to Marta. On the remaining counts, the jury found that plaintiff did prove by a preponderance of the evidence the elements of its claims, but found further that plaintiff was barred from recovering on those claims due to the defendants having proved by a preponderance of the evidence the defense of unclean hands. Plaintiff moves for judgment notwithstanding the verdict ("judgment n.o.v."), pursuant to Federal Rule of Civil Procedure 50(b),[1] on these latter three claims. The basis for plaintiff's Motion is its assertion that the defense of unclean hands is available only in an action seeking equitable relief, not an action at law; that the instant action is one at law; that therefore as a matter of law the defense of unclean hands is unavailable to defendants in this case; and thus that this Court's inclusion of a jury instruction and jury interrogatories on the defense of unclean hands was erroneous. In the alternative, plaintiff contends that even if the defense of unclean hands is available in the instant action, the evidence at trial is insufficient to support it.

II. Discussion

A. Availability of the Defense of Unclean Hands

The first ground on which plaintiff seeks judgment n.o.v. is that the defense of unclean hands is unavailable to defendants as a matter of law. Defendants contend that plaintiff's motion for judgment n.o.v. should not be granted on this ground because, inter alia, plaintiff failed to object to this Court's jury instruction on unclean hands during trial as required under Federal Rule of Civil Procedure 51 ("Rule 51"). Because of this failure, defendants argue, plaintiff has waived its right to assert this theory now. This Court concurs with defendants and therefore will not grant plaintiff's Motion on this

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1. Plaintiff erroneously states that the instant Motion is brought pursuant to Federal Rule of Civil Procedure 59(e). In fact, a motion for judgment notwithstanding the verdict is properly brought pursuant to Federal Rule of Civil Procedure 50(b). See Fed. R. Civ. P. 50 advisory committee's note.

ground.

Rule 51 provides as follows:

> No party may assign as error the giving or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.

A review of the record reveals that plaintiff did not object to the giving of the instruction on the defense of unclean hands at any time during trial, despite this Court having provided plaintiff's counsel with numerous opportunities to do so. The first opportunity arose in connection with this Court's direction to all counsel to prepare joint proposed jury instructions on all points for trial. For those points on which counsel could not agree, counsel were instructed to submit independent supplemental instructions. The proposed instructions submitted to this Court included one on the defense of unclean hands. Upon submission of the proposed points, plaintiff's counsel did not indicate in any way to this Court that plaintiff objected to the inclusion of the point on unclean hands.[2] The second opportunity arose one day prior to this Court's charging of the jury, when this Court distributed to all counsel a draft of the jury instructions and interrogatories, which were based in large part upon the joint proposed instructions submitted to this Court by all counsel. On that day, this

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2. In fact, this failure to object occurred despite this Court having put plaintiff on notice that it would instruct the jury on the defense of unclean hands. On the third day of trial, while counsel were still working on the proposed jury instructions, this Court gave notice to plaintiff that evidence pertaining to the defense of unclean hands was admissible at trial, and thereby implied that the jury would be instructed on that defense. By Order dated November 29, 1995, this Court granted plaintiff's Motion in Limine and Supporting Memorandum of Law to Exclude the Defendants from Introducing Any Evidence Relating to the Defense of Equitable Subordination, but with one qualification. This Court stated that "to the extent that any evidence pertaining to a defense of unclean hands is identical to that pertaining to a defense of equitable subordination, defendants are not precluded from offering such evidence." Plaintiff did not object to the inclusion of evidence relating to the defense of unclean hands in its Motion in Limine, nor did it object after receiving this Court's November 29, 1995 Order.

Court held a charging conference at which time all counsel were given the opportunity to present their objections to the instructions and interrogatories. While plaintiff's counsel made numerous objections to both the instructions and the interrogatories,[3] none involved the defense of unclean hands. The final opportunity arose the day the jury was charged, when this Court distributed to all counsel a copy of the final instructions and interrogatories and again asked if counsel had any objections. Plaintiff's counsel responded at that time that he had no objections.

Under Rule 51, "[n]o party may assign as error the giving ... [of] an instruction unless he objects thereto before the jury retires to consider its verdict." City of Springfield v. Kibbe, 480 U.S. 257, 259 (1987); *see also*, City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 255 (1981) (stating that the district court could have declined to rule on the merits of a motion for a new trial due to petitioner's procedural default under Rule 51); Dubose v. Kansas City Southern Railway Co., 729 F.2d 1026, 1032 (5th Cir. 1984), *cert. denied*, 469 U.S. 854 (1984) (stating that the failure to object to a jury instruction ordinarily bars a later challenge to that instruction). "The purpose of Rule 51 ... is to afford the trial judge an opportunity to correct the error in his charge before the jury retires to consider its verdict." Porter v. Amer. Export Lines, Inc., 387 F.2d 409, 412 (3d Cir. 1968). "Thus, a district court should not grant a motion for posttrial judgment or a new trial where the losing party requests the trial judge to consider a new theory which could have been raised during the original proceedings." GBS Meat Industry Pty. Ltd. v. Kress-Dobkin Co., Inc., 474 F.Supp. 1357, 1362(W.D.Pa. 1979), *aff'd without op.*, 622 F.2d 578 (3rd Cir. 1980).

Plaintiff is asking this Court to do just that, to "consider a new theory which could have been raised during the original proceedings," namely, that the defense of unclean hands is unavailable to defendants as a matter of law. Because plaintiff did not raise this theory during the original proceedings as is required under Rule 51, this Court will not consider it now. Accordingly, plaintiff's Motion for judgment n.o.v. will not be granted on this ground.

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3. Plaintiff made approximately twelve (12) objections to the instructions and interrogatories.

B. Sufficiency of the Evidence in Support of the Jury's Finding of Unclean Hands

Because this Court does not grant plaintiff's Motion on the ground that the defense of unclean hands is unavailable to defendants as a matter of law, this Court must now address plaintiff's alternative ground, that is, that the evidence at trial is insufficient to support the jury's finding of unclean hands.

Defendants contend that plaintiff's motion for judgment n.o.v. should not be granted on this ground because, inter alia, plaintiff failed to move for a directed verdict [4] on this ground at trial. This Court concurs with defendants and therefore will not grant plaintiff's Motion on this ground.

"In order to preserve an issue for judgment n.o.v., the moving party must timely move for a directed verdict and specify the grounds for that motion." Fineman v. Armstrong World Industries, Inc., 980 F.2d 171, 183 (3rd Cir. 1992), *cert. denied*, 507 U.S. 921 (1993) (citations omitted); *see also*, Orlando v. Billcon Int'l, Inc., 822 F.2d 1294, 1298 (3d Cir. 1987) (stating that Federal Rule of Civil Procedure 50(b) permits consideration of a motion for judgment n.o.v. only when a motion for a directed verdict has been made at the close of the evidence offered by an opponent); Fed. R. Civ. P. 50(b) advisory committee's note (stating that the post-verdict motion is a renewal of an earlier motion made at the close of the evidence). A Rule 50(b) post-trial motion for judgment can be granted only "on grounds specifically advanced" in the motion for a directed verdict. Kutner Buick, Inc. v. Am. Motors Corp., 868 F.2d 614 (3rd Cir. 1989); *see also* Orlando, 822 F.2d at 1298 (citing Bonjourno v. Kaiser Aluminum & Chemical Corp., 752 F.2d 802, 814 (3rd Cir. 1984), *cert. denied*, 477 U.S. 908 (1986)); Fed.R.Civ.P. 50(b) advisory committee's note. "[T]he purpose of the requirement that a party

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4. The terms "directed verdict" and "Rule 50(a) judgment as a matter of law" are used interchangeably throughout this Memorandum, as are the terms "judgment notwithstanding the verdict" and "Rule 50(b) renewed motion for judgment as a matter of law." While the 1991 Amendments to the Federal Rules of Civil Procedure adopted the latter terms in place of the former, the amendments were of name only and effected no change in the substantive standards relating to the motions. See Fed. R. Civ. P. 50 advisory committee's note.

move for a directed verdict before moving for a judgment notwithstanding the verdict is to provide the opposing party an opportunity to cure defects in his proofs which could not be remedied except by a new trial if first raised on a motion for a judgment notwithstanding the verdict." Levinson v. Prentice-Hall, Inc., 868 F.2d 558, 562 (3rd Cir. 1989) (citing Orlando, 822 F.2d at 1298). Thus, any argument omitted from the motion made at the close of all the evidence is waived as a ground for judgment under Rule 50(b). Sweeney v. Westvaco Co., 926 F.2d 29, 37 (1st Cir. 1991), *cert. denied*, 502 U.S. 899(1991); *see also* 5A James W. Moore et al., Moore's Federal Practice ¶¶ 50.05-50.08 (2d ed.).

A review of the record in the instant case reveals that plaintiff did not move for a directed verdict on the ground that the evidence was insufficient to support a finding of unclean hands. As such, this Court will not consider this argument now and thus will not grant plaintiff's Motion for judgment n.o.v. on this ground.

III. Conclusion

Because this Court will consider neither the argument that the defense of unclean hands is unavailable to defendants as a matter of law, nor the argument that the evidence at trial is insufficient to support the jury's finding of unclean hands, plaintiff's Motion will be denied.

An appropriate Order follows.

/s/
Clarence C. Newcomer, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
Civil Action; No. 94-4592

DEUTSCHE FINANCIAL SERVICES CORP.
Plaintiff,
v.
MARTA GROUP , INC ., et al.
Defendants,

ORDER

AND NOW, this 2nd day of February, 1996, upon consideration of Plaintiff's Motion for Judgment Notwithstanding the Verdict, and defendants' responses thereto, and consistent with the foregoing Memorandum, it is hereby ORDERED that said Motion is DENIED.

AND IT IS SO ORDERED

/s/
Clarence C. Newcomer, J.

Supreme Court, U.S.
FILED
AUG 1997
CLERK

No. 97-131

In The Supreme Court Of The United States

OCTOBER TERM 1997

A-1 APPLIANCE; ALBO APPLIANCE; APPLIANCE WORLD, INC.; BLONDER'S DISCOUNT APPLIANCE CENTER, INC.; CT'S VIDEO AND APPLIANCES; INNERSPACE, INC.; JOHNNIES APPLIANCE; NATASTI'S INC; POMOLIO APPLIANCE; WOODBURY APPLIANCE; YERKES APPLIANCE,
Petitioners,

v.

DEUTSCHE FINANCIAL SERVICES CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHNSON, BLAKELY, POPE, BOKOR, RUPPEL & BURNS, P.A.
Charles M. Tatelbaum
Counsel of Record
James W. Humann
Post Office Box 1368
Clearwater, Florida 34617-1368
(813) 461-1818

Robert Litz
DEUTSCHE FINANCIAL SERVICES CORP.
655 Maryville Center Drive
St. Louis, Missouri 63141
(800) 873-8862

MAGER, LIEBENBERG AND WHITE
Roberta D. Liebenberg
2 Penn Center, 10th Floor
Philadelphia, Pennsylvania 19102
(215) 569-6921

Counsel for Respondents

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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RESPONDENT'S STATEMENT OF THE CASE

Plaintiff/Appellant/Respondent ITT COMMERCIAL FINANCE CORP. (now known as Deutsche Financial Services Corporation, but referred to in the actions below and in this Brief as "ITT,") presents its own Statement of the Case to supplement, clarify, and rectify any omissions or misimpressions arising from the statement of the case presented by the Petition for Writ of Certiorari filed by Defendants/Appellees/Petitioners A-1 APPLIANCE; ALBO APPLIANCE; APPLIANCE WORLD, INC.; BLONDER'S DISCOUNT APPLIANCE CENTER, INC.; CT'S VIDEO AND APPLIANCES; INNERSPACE, INC.; JOHNNIES APPLIANCE; NATASTI'S INC.; POMOLIO APPLIANCE; WOODBURY APPLIANCE; YERKES APPLIANCE (collectively, "Petitioners").

This case began as a diversity action before the U.S. District Court for the Eastern District of Pennsylvania, where

ITT sought to recover secured property from Defendants/Appellees/Petitioners. The jury returned a verdict favorable to ITT on three of four counts, but found for the Defendants on the defense of "unclean hands." The district court entered judgment for the Defendants, and ITT appealed to the Third Circuit Court of Appeals.

ITT argued on appeal that it was error for the trial judge to instruct the jury on unclean hands, that ITT's objections to numerous analogous defenses had been overruled by the trial court, and that the facts presented at trial could not support a jury finding of unclean hands. On appeal, the United States Court of Appeals for the Third Circuit found that although the district court committed no "plain error" on the issue of jury instructions, the trial testimony failed to establish a case of unclean hands. On page 11 of its Order, the Third Circuit ruled: "Consequently, because there was insufficient evidence to support a finding

of unclean hands, judgment should have been entered in favor of ITT and the case should have proceeded to damages."[1]

Petitioners have filed a Petition for Writ of Certiorari to have this Honorable Court review Third Circuit's ruling. ITT files this Response in opposition to Petitioners' Brief.

RESPONDENT'S ARGUMENT SUMMARY

Review of this cause is unnecessary and inappropriate. Petitioners' jurisdictional reliance on 28 U.S.C. Sec. 1254(1) is misplaced. No direct conflict with other appellate courts has been presented, no important federal question is at issue, and the exercise of this Court's supervisory power is unnecessary. Further, Petitioners fail to raise any coherent constitutional challenge. Finally, the weight of authority,

[1] A copy of the Third Circuit's Opinion was attached to the Petition for Writ of Certiorari.

including the cases cited by Petitioners themselves in the petition, support the proper ruling of the Third Circuit.

ARGUMENT

I. THE PETITION PRESENTS NO CONSIDERATIONS JUSTIFYING REVIEW BY THIS HONORABLE COURT.

This case presents no conflict in appellate courts, no federal question, and no departure from the accepted and usual course of judicial proceedings. Review by certiorari is discretionary, and will be granted only for "compelling reasons." Sup. Ct. R. 10. Petitioners' Brief falls far short of that exacting standard.

Petitioners argue in their Brief that the Third Circuit's ruling "directly conflicts" with other decisions. Review based on a claimed conflict cannot be illusory; it must involve issues of importance to the public, and be "real and embarrassing." *Rice v. Sioux City Memorial Park Cemetery,*

Inc., 349 U.S. 70, 79 (1955). None of these requirements are met by Petitioners' Brief.

Although Petitioners cite several cases, only two are discussed in their Brief: *Bonjorno* v. *Kaiser Alum. & Chem. Corp.*, 752 F.2d 802 (3d Cir. 1984*), cert. den.* 477 U.S. 908 (1986), and *Neely v. EBY Constr. Co.*, 386 U.S. 317 (1967. Neither case supports Petitioners and, in fact, *Neely* especially favors ITT, for reasons explained more fully below.

Bonjorno held merely that a litigant's failure to raise an issue at trial prevents that party from obtaining a later JNOV. 752 F.2d at 814. The instant case, on the other hand, is different. The trial court prevented ITT, on the record, from presenting fully its motion for a directed verdict. This specific issue -- when a party is prevented from explaining fully its position -- was presented for appellate review to the

Third Circuit.[2] The Third Circuit found correctly that since the trial judge prevented ITT from making its full argument, the trial judge was "apparently aware of ITT's position [and] nothing further was required [under Fed.R.Civ.P. 50(a)(2)]." (See Petition for Writ of Certiorari at p. 9a.).

ITT's position is identical to that presented in *Miller v. American President Lines, Ltd.*, 989 F.2d 1450 (6th Cir. 1993), *reh. en banc den.* 1993 U.S. App. Lexis 11413, *cert. den.* 126 U.S. 252 (1993). In *Miller*, the district court summarily overruled a litigant's motions for directed verdict. On appeal, the Sixth Circuit found that the trial judge "apparently considered himself sufficiently apprised of the moving parties' positions," and that therefore, the "particular purpose" of Fed.R.Civ.P. 50(a) had been served. *Id.* at 1465.

[2] ITT briefed this matter to the Third Circuit, with quotations from, and citations to, the trial record, on pages 35-36 of ITT's Initial Brief.

"Apparent awareness" of a party's position therefore satisfies the requirements of Rule 50. A case which *Miller* cited with approval, *Riverview Investments v. Ottawa Community Improvement Corp.*, 899 F.2d 474 (6th Cir. 1990), *cert. den.* 498 U.S. 855 (1990), also supports ITT's position. *Riverview* noted that technical deviations from Rule 50 are "not fatal," because its "slavish application" would be at variance with the rule's spirit. *Id.* at 477.

Neely, the only other case discussed by Petitioners, does not support their argument. *Neely* follows the logic outlined in *Riverview*. In *Neely*, this Court recognized that none of its decisions interpreting Rule 50 mandate an "ironclad rule." 386 U.S. 317 at 326. On the contrary, the Court in *Neely* cited several cases which interpreted Rule 50 flexibly, then commented:

> In view of these cases, the language of Rule 50(d), and the statutory grant of broad appellate jurisdiction, we think a more discriminating

> approach is preferable to the inflexible rule for which the petitioner contends.

Id.

It is evident from the opinion of the Third Circuit that the court exercised its appellate jurisdiction within the spirit of Rule 50(d). The well reasoned opinion of the appellate court indicates the court reviewed the trial transcript and familiarized itself with ITT's position with respect to the Rule 50 motion. Thus, there is no departure from the accepted course of judicial proceedings and this Court should therefore deny the Petition.

II. PETITIONERS SEEKS REVIEW OF FACTUAL MATTERS, WHICH IS INAPPROPRIATE BEFORE THIS COURT.

A petition for writ of certiorari is rarely granted "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule." Sup. Ct. R. 10. Accordingly, this Court has also long held that it will not grant a writ of certiorari to review evidence and discuss

specific facts. *U.S. v. Johnson*, 268 U.S. 220 (1925); *Hallowell v. U.S.*, 209 U.S. 101 (1908).

Yet, this is exactly what Petitioners seek. The Third Circuit's decision was based on a review of the sufficiency of the trial testimony, relating to the defense of "unclean hands." That Court reviewed the transcript, and found specifically, on page 11 of its Order, that the facts presented at trial did not justify a finding of unclean hands. In the words of the Third Circuit: "We fail to see how evidence of two or three business lunches with the executive director in a twelve-year period constitutes a basis for finding unclean hands." (See Petition for Writ of Certiorari at p. 10a.). The Third Circuit's fact-based decision, premised on the sufficiency of the evidence, was based on a proper, reasoned deliberation, and should not now be disturbed.

CONCLUSION

In conclusion, review of this cause is inappropriate as the Petitioners' Brief presents no considerations justifying review. The reasoned decision of the Third Circuit is aptly supported by established authority. Moreover, the Brief should be denied because Petitioners seek review of factual matters which is inappropriate before this Court.

WHEREFORE, Respondent DEUTSCHE FINANCIAL SERVICES CORPORATION (f/k/a ITT Commercial Finance Corp.) respectfully requests this Honorable Court to deny the instant Petition for Writ of Certiorari.

Respectfully submitted,

JOHNSON, BLAKELY, POPE, BOKOR, RUPPEL & BURNS, P.A.

Charles M. Tatelbaum
James W. Humann
Post Office Box 1368
Clearwater, FL 34617-1368
(813) 461-1818
Attorneys for Respondent

(3)

Supreme Court, U.S.
FILED
AUG 21 1997
CLERK

No. 97-131

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

A-1 APPLIANCE; ALBO APPLIANCE; **APPLIANCE WORLD, INC.;** BLONDER'S DISCOUNT APPLIANCE CENTER, INC.; **CT'S VIDEO AND APPLIANCES;** INNERSPACE, INC.; **JOHNNIES APPLIANCE;** NATASTI'S INC.; **POMOLIO APPLIANCE;** WOODBURY APPLIANCE; **YERKES APPLIANCE,**
Petitioners

v.

DEUTSCHE FINANCIAL SERVICES CORP.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

PETITIONERS' REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT L. WHITE
172 Middletown Blvd., Suite 203
Langhorne, PA 19047
215.752.3535
Petitioners' Counsel of Record

5 PM

REPLY ARGUMENT

Respondent has argued in its *Brief in Opposition* that: (1) it was prevented by the trial court from making its full argument, and (2) ITT's position is identical to the case of Miller v. American President Lines, Ltd., 989 F.2d 1450 (6th Cir. 1993), *reh.en banc den.* 1993 U.S. App. Lexis 11413, *cert. den.* 126 U.S. 252 (1993). These arguments are flawed.

I.) ITT was not prevented by the trial judge from making its argument. The Third Circuit made no finding of fact that Respondent was prevented from making its argument. The record is clear. The respondent and the trial judge stated as follows:

> RESPONDENT: *Before we do that, Your Honor, I have motions to make under Rule 50 for directed verdict. So, I don 't know how the Court would like to handle that.*
>
> THE COURT: *Well, unless you have something new and unknown to me, I 'm going to deny your motion now on the issues -- on the basis that these constitute issues of fact, not of law for the Court to decide.*
>
> RESPONDENT: *As long as my motion is noted of record.*
>
> THE COURT: *It is noted.*

See page 465 of Appellate Appendix, volume 2.

It is clear from a reading of the record that Respondent had an opportunity to state its objection to the insufficiency of the evidence to support unclean hands and failed to do so. Petitioner and the trial judge both understood Respondent at the Rule 50(a) motion to be preserving issues which had been raised at trial prior to the motion. Insufficency of the evidence of unclean hands had not been raised up to that point in the trial. The trial judge clearly gave counsel the oppurtunity to raise this new issue at that time and counsel failed to raise the new issue.

II.) ITT argues that its position is identical with the case of Miller, *supra. See* page 6 of *Brief in Opposition.* This simply is not true. The trial court in Miller specifically addressed the sufficiency of evidence argument at the time that a Rule 50(a) motion should have been made and specifically prevented the litigant from making a Rule 50(a) motion. It stated as follows:

> THE COURT: *I have been in here with all of you two weeks. I heard the evidence. I am satisfied there is sufficient evidence on all of the issues of negligence and unseaworthiness to submit the case to the jury. And I am going to overrule all the motions, exceptions noted, I have.*
>
> Miller, 989 F.2d at 1465.

In the instant case Respondent was not prevented from making an objection and there has been no finding of fact by the Third Circuit below that Respondent was prevented from making an objection. **The Third Circuit below improperly stated a rule of law.** It held that when the trial judge told Respondent that "nothing further was required" during its Rule 50(a) motion that Respondent had no duty to state its objection regarding insufficiency of evidence as to the unclean hands defense. *See* page 9a of *Petition.* This is not the law in Miller. It is clear from reading Miller that "apparent awareness" only applies if the trial judge prevented the litigant from stating its objection during its Rule 50(a) motion.

In the instant case, Respondent always had an opportunity at the trial to object to the sufficiency of evidence regarding unclean hands. Respondent simply chose not to do so, and in so doing should have been considered to have waived its right to make such an objection/argument on appeal.

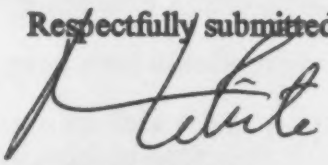
Petitioner is not asking for a "slavish application" of Rule 50 as suggested by Respondent.. Fairness dictates that the non-moving party be apprised of any of the movant's agruments so that it may have the oppurtunity to reopen its

case and present additional evidence. *See* Bonjorno v. Kaiser Alum. & Chem. Corp., 752 F.2d 802 (3d Cir. 1984), *cert.den.* 477 U.S. 908 (1986), and Lowenstein v. Pepsi-Cola Bottling Co., 536 F.2d 9, 11(3d Cir), *cert. denied*, 429 U.S. 966, 97 S. Ct. 396, 50 L.Ed.2d 334 (1976). The Third Circuit erred when it considered the insufficiency of evidence issue on appeal because Petitioners were never given an oppurtunity to present additional evidence. In so doing it departed from the accepted and usual course of judicial proceedings. *See* Neely v. EBY Construction Co., 386 U.S. 317; 87 S.Ct. 1072; 18 L. Ed. 75 (1967).

CONCLUSION

For the foregoing reasons, and the reasons presented in the original Petition, the Petitioner respectfully prays that the petition for writ of certiorari be granted.

Respectfully submitted,



Robert L. White
172 Middletown Blvd., Ste. 203
Langhorne, PA 19047
215.752.3535
Petitioners' Counsel of Record